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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963 4

PEARL E. DILLEY, ADMINISTRATRIX OF THE ESTATE OF GLEN D. DILLEY, DECEASED,
Petitioner.

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RICHARD T. RECTOR,
50 East Broad Street, Columbus, Ohio.
Attorney for the Respondent.

HARRISON W. SMITH, JR.,
WILSON & RECTOR
of Counsel.

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus 15, Ohio

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QUESTIONS PRESENTED

1. In a personal injury action brought pursuant to the Federal Employers' Liability Act is it reversible error for the trial court to permit the plaintiff to introduce into evidence over objection a departmental form filled out by the injured employee's foreman and fellow servant and submitted by the foreman to his superiors where the only arguably relevant statement contained in the form is the

opinion of the foreman as to the cause of the accident and where there is no showing that that opinion was in any wise expert or based on facts within the personal knowledge of the foreman?

2. In a personal injury action brought pursuant to the Federal Employers' Liability Act where the jury has been presented with no evidence and has heard nothing from any witness or pleading with respect to the doctrine of assumption of the risk, is it not at least the better practice to preclude counsel in their final arguments from referring to the doctrine and to eliminate any reference to the doctrine in the Court's charge to the jury?

STATEMENT OF THE CASE

As indicated by the footnote at page 6 of the petition the petitioner has indicated references to pages in the Appellant's appendix below by the use of the suffix "a" and to pages in the original typewritten transcript of testimony by the use of the prefix "Tr.". In order to avoid confusion the respondent will continue the same method of indicating page references.

The facts recited in the petition at page 5 and in the first two full paragraphs of page 6 are for the purposes of this proceeding not disputed. In addition to these facts the evidence at the trial established that

Dilley was in charge of this work (Tr. 93, 94) (29a) but at the same time as Gwinn instructed Dilley to do the work he stated that Lushbaugh was to operate the jeep and be in charge of the jeep (Tr. 34, 90, 159) (15a, 28a, 37a). Lushbaugh and Foreman Gwinn were qualified drivers (Tr. 156) (35a) and it was a rule of the company and a policy of Gwinn's that only those persons who were qualified to drive were permitted to operate company vehicles (Tr. 156, 158, 159) (35a, 36a, 37a).

Dilley was present when the foreman assigned the jeep to Lushbaugh (Tr. 90) (28a).

Dilley had no automobile operator's license (Tr. 25) (13a); no experience in the operation of company vehicles and, in particular, jeeps (Tr. 97, 116, 157) (31a, 33a, 36a) and was not qualified or permitted to operate defendant's motor vehicle (Tr. 156) (36a).

Foreman Gwinn had instructed all qualified drivers, in Dilley's presence, to operate company vehicles only when it was safe so to do (Tr. 158) (36a).

Lushbaugh drove the jeep to Hyatts and to the derail 180 feet from the switch, at which point he stopped and refused to go further (Tr. 47, 92), (17a, 28a). Foreman Gwinn had operated a jeep from the derail to the switch and had found it necessary to stay immediately adjacent to the ties in order to proceed over the 180-foot distance (Tr. 185, 186, 187) (44a, 45a). Lushbaugh had operated a jeep from the derail to the switch on at least one instance and on one instance the jeep had "scooted" over the side of the embankment (Tr. 102, 103, 104) (32a, 33a).

After stopping the jeep and refusing to operate the jeep further toward the switch, Lushbaugh stated it was too dangerous to proceed further. (Tr. 47, 48, 93) (18a, 28a, 29a).

Hatcher also advised Dilley that it was dangerous to proceed. (Tr. 47, 48) (18a).

Dilley, disregarding the pleas of his co-workers, proceeded to order Lushbaugh and Hatcher out of the jeep, stating that he would drive the jeep from the derail to the switch (Tr. 47, 93) (18a, 29a).

Hatcher and Lushbaugh continued their protestations and when it became apparent that Dilley intended to operate the jeep, Hatcher attempted to help by using physical

force to keep the jeep on top of the embankment (Tr. 50, 94) (19a, 29a).

After Dilley had operated the jeep toward the switch for a few feet, the jeep overturned down the embankment and Dilley was severely injured from which injuries he died approximately one month later (Tr. 95) (30a).

It was by no means an accepted fact, as petitioner indicates at page 6 of her petition, that "the bank gave way and the jeep rolled down the embankment". Rather as the Court of Appeals fully appreciated and stated at the third page of the opinion (page 25 of the petition):

> "the most crucial factual question presented by the evidence in this case was whether, as plaintiff contends, the fatal accident occurred because the embankment was defective and suddenly gave way or whether, as defendant contends, it was caused by the plaintiff's decedent undertaking to operate the jeep and negligently driving it too near the edge or even over the edge of the embankment so as to cause it to overturn."

Throughout the trial and at every stage therein this factual dispute continued and it was within this context that petitioner was permitted to introduce over objection the Claim Department Form, No. CJ 68, which had been filled out by Foreman Gwinn. This document was admitted into evidence as plaintiff's Exhibit No. 5 (Tr. 188, 189, 190, 191) (45a, 46a). On this form in response to the question "Describe in full how accident occurred", Gwinn admitted that he had written "Jeep upset from right-of-way when cinders and bank gave way".

Gwinn's response was a mere opinion for Gwinn was not an eye witness to the accident nor was he an expert on embankments. He had talked to Dilley after the accident (Tr. 165) (40a) and perhaps to others involved. He had made a personal examination of the scene sometime after

the accident (Tr. 167).* Had he attempted to testify as to his opinion as to the cause of the accident on the basis of these conversations and his examination and nothing further, that opinion would not have been admissible. As a matter of fact when respondent on direct attempted to solicit from Gwinn his opinion as to the cause of the accident an objection was sustained. (Tr. 166).* Yet when that opinion was offered by petitioner as a statement contained in plaintiff's Exhibit 5, it was admitted. The jury had before it a statement of an agent of the respondent, which statement was the only evidence which directly supported petitioner's theory of what caused the accident.

At the conclusion of all the evidence and prior to the arguments respondent anticipatorily objected to any reference to assumption of the risk being made in either the arguments of counsel or the charge. Respondent had at no time pleaded the doctrine as a defense nor was there by evidence any claim that Dilley had assumed the risk. At no time during the case had petitioner objected to any evidence on the grounds that it introduced into the case the doctrine of assumption of risk. If petitioner claimed that the defense was that of assumption of risk, this claim presented a question for the Court and the proper method of raising the question was by objection to evidentiary matter or motion to strike evidence pertaining to the doctrine.

This anticipatory objection was overruled and counsel was permitted in argument to define the defense as that of assumption of risk, thereby presenting a question of law to the jury. Respondent's only recourse was to reassert that its defense was that of contributory negligence. The Court charged on the doctrine by reading the statute, thereby saying, in effect, that the doctrine was in the case as counsel for petitioner had said it was.

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* We refer the Court to Appendix A hereof.

The jury returned a verdict for petitioner and after motions for judgment and for new trial had been overruled by the trial Court respondent perfected an appeal to the United States Circuit Court of Appeals for the Sixth Circuit. Before the Court of Appeals respondent complained of nine separate and prejudicial errors, among which were the admission into evidence of plaintiff's Exhibit 5, and the argument and charge on the doctrine of assumption of risk.

The Court of Appeals held that the trial Court committed prejudicial error in admitting plaintiff's Exhibit 5 and stated at page 8 of its opinion (page 30 of the petition) that the Exhibit "was not an admission of the railroad and was not admissible under any suggested rule of evidence." In view of this determination the Court stated that a new trial was necessary and did not consider the other errors urged by the respondent. The Court of Appeals did comment on the handling of the doctrine of assumption of risk under the circumstances of this case, stating at page 9 of the opinion (page 31 of the petition):

> "However, where the jury as in this case has been presented with no evidence and has heard nothing from any witness or pleading with respect to the doctrine of assumption of risk until the doctrine was defined and its application to the facts of the case debated in final arguments of counsel and thereafter merely mentioned in court instructions it is believed that it would have been the better practice to have eliminated any reference to the doctrine."

SUMMARY OF ARGUMENT IN OPPOSITION TO THE WRIT

No federal question in the sense urged by petitioner is involved in the decision of the Court of Appeals.

The Court of Appeals correctly decided this case on a question of evidence.

The decision of the Court of Appeals upon the facts of this case is not contrary to nor in conflict with applicable decisions of this Court or decisions of other Courts of Appeal.

The observations of the Court of Appeals on the doctrine of assumption of risk are in full accord with the applicable decisions of this Court and other Courts of Appeal.

Other and further questions remain undetermined by the Court of Appeals and no action by this Court at this time will finally dispose of this case.

ARGUMENT IN OPPOSITION TO THE WRIT

Petitioner infers that this case somehow comes within the mandate of this Court that in an action under the Federal Employers' Liability Act a jury verdict is not lightly to be vitiated. This case does not concern this often announced principle and no Federal question in the sense urged by petitioner is here presented. This is not a case wherein the trial Court directed a verdict or entered judgment contrary to a verdict. Nor is this a case wherein the Court of Appeals reversed a jury's verdict on the weight of the evidence or as a result of a determination that the defendant was entitled to judgment as a matter of law. Rather the Court of Appeals has ordered a new trial as a result of its finding that the trial Court committed error and that, upon the facts of this case, the error was prejudicial to respondent's substantial rights. Neither petitioner nor respondent have been or will be deprived of their re-

spective rights to have the issues herein joined submitted to a jury. When the Court of Appeals ordered a new trial this was not a denial of a jury trial but rather a guarantee to both parties of a full trial upon all that which is, in law, evidence.

Petitioner contends that plaintiff's Exhibit 5 was admissible in that it tended to impeach Gwinn as a prior inconsistent statement. That in plaintiff's Exhibit 5 which was claimed to impeach was Gwinn's opinion as to the cause of the accident. This opinion is in no wise inconsistent with anything to which Gwinn testified for, as previously pointed out, when the respondent attempted to obtain Gwinn's opinion on direct an objection was sustained. (Tr. 166).* If Gwinn had been permitted to testify on direct and his opinion was other than is expressed in plaintiff's Exhibit 5, then only would the statement in the exhibit have tended to impeach. But assuming the impeaching nature of the statement, the Exhibit was still not admissible and the Court of Appeals so held. The Court of Appeals ruled that since Gwinn admitted making the statement contained in plaintiff's Exhibit 5 the Exhibit itself was not admissible and cited in support thereof 58 Am. Jur. Witnesses Section 780, and 98 C. J. S. Witnesses Section 610. Petitioner disputes these authorities and relies primarily upon the case of *Gordon, et al. v. United States*, 344 U. S. 414.

The opinion in *Gordon, supra*, reveals several reasons why the ruling of that case need not and should not apply here. In the first place, *Gordon, supra*, concerned a motion for production and this Court stated at page 418 of the opinion "Demands for production and offers in evidence raise related issues but independent ones, and production

* We refer the Court to Appendix A hereof.

may sometimes be required though inspection may show that the document could properly be excluded."

In the second place *Gordon, supra,* dealt with the right of an accused in a criminal trial to obtain prior inconsistent statements of a vital prosecution witness and this Court stated at page 418 of the opinion: "We need not consider such broad doctrines in order to resolve this case, which deals with a limited and definite category of documents to which the holdings of this opinion are likewise confined."

In the third place the documents sought in *Gordon, supra,* dealt with the sole issue being tried, the participation of the accused in the crime. Here the document deals with an opinion of cause by the non-expert Gwinn.

In the fourth place in *Gordon, supra,* the documents had only been generally described and this Court stated at page 421 of the opinion that "the document is a more reliable, complete and accurate source". Here the only pertinent part of the document was read word for word to the jury and the document could in no way amplify, explain or complete.

Finally, this Court stated at page 421 of the opinion in *Gordon, supra,* "Traditional rules of admissibility prevent opening the door to documents which merely differ on immaterial matters." If the statement contained in the Exhibit does impeach at all, it impeaches only in the area of Gwinn's conclusions, the basis of which is not in the record. These conclusions, this opinion, are immaterial matters for the question in this case was the fact not what Gwinn may or may not have thought the fact to be. In *Gordon, supra,* at page 420 of the opinion it is stated that the document in *Gordon* was admissible "providing it meets all other requirements of admissibility". The true difficulty with plaintiff's Exhibit 5 is that it meets no tests of ad-

missibility, as the Court of Appeals held, for it is a mere opinion of a non-expert witness, the basis of which is not even in the record. *Gordon, supra,* in no wise requires the conclusion that plaintiff's Exhibit 5 was admissible for impeachment purposes.

The fact is that plaintiff's Exhibit 5 was neither offered nor admitted solely for impeachment purposes. It was offered, admitted and available to the jury as substantive evidence of the fact therein contained on the theory that it was an admission of an agent within the scope of that agent's authority and binding upon the employer-principal. This is conclusively shown by petitioner's reliance throughout these procedures on the cases of *Dotson v. Penn. R. R. Company,* 142 F. Supp. 509 (W.D.Pa., 1956) and *Chicago St. Paul, M & O Ry. v. Kulp,* 102 Fed 2d 352, (Cert. den. 307 U. S. 636). These cases held that the accident reports therein involved were admissible as substantive evidence and as admissions. Furthermore the trial Court in the motion for new trial justified the admission of plaintiff's Exhibit 5 on the basis of *Dotson* (9a) and consistent with this he stressed that it was substantive evidence that what Dilley had done was not "out of the ordinary" (9a). The question is whether plaintiff's Exhibit 5 was admissible as substantive evidence on any theory.

In *Kulp, supra,* the accident report contained statements as to the physical circumstances within the conductor's knowledge and also an opinion as to the cause of injury. At page 356 of the opinion the Court said: "We do not stress this opinion-statement as substantive evidence" and further "This report as to the physical circumstances within the personal knowledge of Conductor Helmer is admissible". *Kulp* then is authority for the proposition that the opinion statement of Gwinn was inadmissible. The

Court of Appeals plainly disagreed with *Dotson supra* but the Court of Appeals also pointed out that *Dotson* was distinguishable upon its facts. In *Dotson* the District Court evidently found that the conductor had powers broad enough to constitute him the general representative of his principal with managerial responsibilities. On this basis the Court in *Dotson* concluded that the scope of the conductor's employment permitted the making of admissions binding upon the principal. Certainly there is no evidence in this case to indicate that Gwinn had any such authority and the cases are distinguishable.

To apply the rule announced by the District Court in *Dotson, supra,* to a statement by an employee such as Gwinn is contrary to the established rules of evidence. Even if the Gwinn statement had been communicated to third persons it would not have been admissible against his principal for the simple reason that Gwinn had no authority to bind his principal. The Catalina, 95 Fed. 2d. 283; *Atchison T. & S. F. R. Co. v. Burks*, 96 P. 950. How then can it have been admissible where it was, as here, communicated not to third parties, but to other agents of the same principal? The only argument of which we can conceive is that it was some sort of business record. That it was not has been clearly stated by this Court in *Palmer v. Hoffman*, 318 U. S. 109 wherein it was said at page 113: "An accident report may affect that business in the sense that it affords information on which the management may act. It is not, however, typical of entries made systematically or as a matter of routine to record events or occurrences, to reflect transactions with others, or to provide internal controls."

No evidentiary rule permits the introduction of the Gwinn report against the respondent. More important, public

policy considerations demand that such reports be excluded. The transportation industry is required to do all within its power to provide safe and efficient transportation of passengers and freight. To do so the industry must be aware of all the facts and circumstances involved in accident or injury. It is therefore in the public good that the railroad employer obtain accident reports from any and all employees, regardless of the employee's authority, containing all that the reporting employee chooses or is able to report. If the rule is that such reports are admissible against the principal to whom the reports are made the only result will be the elimination of all such reports, for the position of the employer will be intolerable. The reporting employee may be the injured employee, may be his foreman, may be his friend; the reporting employee may report the fact, may report opinion, may act to protect himself; may act to assist his fellow employee to the detriment of the employer. The employer has no control; the employer simply seeks information. If all the reports then are admissible the employer is bound by only that which does him harm. In a situation where ten employees witness an accident, nine statements to the effect that the employer was not responsible are inadmissible as self-serving and the one statement, putting the blame on the employer, is admissible. Certainly these considerations require the conclusion that in the public good reports of this nature be excluded from evidence in an action against the railroad employer.

Petitioner also complains of the comments of the Court of Appeals in regard to the doctrine of assumption of risk. It is difficult to understand how these comments can be advanced as arguments wherein the writ should be granted. The Court of Appeals found no reversible error in the

trial Court's handling of assumption of risk. This being so the decision of the Court of Appeals is in no wise contrary to any of the cases relied upon by petitioner. Some of these cases hold that, on the facts therein presented, it is not reversible error to charge on the doctrine. Others hold that, on the facts therein presented, it is not reversible error to refuse to charge on the doctrine. The Court of Appeals in this case merely advised that where there has been no evidence and no pleading with respect to the doctrine it is the better practice to avoid any reference to it. On the basis of all of the cases relied upon by petitioner this instruction would seem to be perfectly accurate and to state the better practice. Petitioner, however, seems to have the feeling that respondent introduced the doctrine into the case under the guise of non-negligence. Petitioner then argues that she had the right to reveal this fiction to the jury by argument and cites in support of this contention the case of *Tiller v. Atlantic Coast Line Railroad*, 318 U. S. 54.

Petitioner fails to comprehend that if she was correct in her claim that respondent relied upon assumption of risk by pleading, evidence or argument, this claim gave rise to a question of law which had to be presented to the trial Court and by that Court determined. But petitioner directed no action to the Court raising the legal question. Rather her counsel stood before the jury and asked the jury to resolve the impossible question of the distinction between assumption of risk and contributory negligence. Counsel in effect said to the jury: "Regardless of what defendant says about contributory negligence he is talking about assumption of risk and this defense is removed by legislative act". In argument counsel for the respondent denied the accusation and denied that the defense was other

than contributory negligence. The Court in its brief charge on the doctrine did give substance to the argument of counsel for the petitioner. A question of law was thereby presented for determination not by the Court but by a jury. Such a procedure is contrary to the clear statements contained in *Tiller, supra.* In *Tiller* at page 63 of the opinion this Court pointed out the confusion and difficulty involved in distinguishing between assumption of risk and contributory negligence, and stated at page 64: "The result is an Act which require cases tried under the Federal Act to be handled as though no doctrine of assumption of risk had ever existed". In *Tiller, supra,* this Court concluded at page 68 with the statement that "We think that the question of negligence on the part of the railroad and on the part of the employee should have been submitted to the jury". The Court of Appeals has instructed that this case shall be tried as though "no doctrine of assumption of risk had ever existed", that no reference to the doctrine should be made, and in effect "that the question of negligence on the part of the railroad and on the part of the employee should [have been] submitted to the jury." This is in accord with our understanding of *Tiller, supra,* emphasized, of course, by the language of Mr. Justice Frankfurter in his concurring opinion contained in 318 U. S., at page 72 wherein it is specifically stated:

> "Because of its ambiguity the phrase 'assumption of risk' is a hazardous legal tool. As a means of instructing a jury, it is bound to create confusion. It should therefore be discarded."

Finally respondent respectfully calls the attention of this Court to the fact that there were numerous other errors urged before the Court of Appeals which the Court of Appeals failed to resolve and which remained unresolved. It

would seem therefore that even if this writ were to be granted, even if the Court of Appeals were to be reversed on the merits in regard to the evidentiary problems herein raised, there would remain further and necessary procedures in order to resolve all of the questions arising out of the trial of this case. The simplier and speedier solution for the parties to this case, at no cost or loss to the public, would be to return forthwith to the trial Court and to present their cause to a jury under proper procedural and evidentiary limitations.

Respectfully submitted,

RICHARD T. RECTOR,
Attorney for the Respondent.

APPENDIX A

* * * * * * * * * * * *

Q. (Tr. 166) Now when you went back to the scene, were you able to discover from an examination of the scene of the accident any indication of the cause of the jeep overturning?

Mr. Gaines: Objection. He may state what he saw, but I don't think he can state what he—pardon me, I am sorry. I don't think he can state the cause and relate it. I am perfectly willing he testify as to what he saw there.

Mr. Smith: Actually, Your Honor, if I may, I think it is almost the identical question asked of the expert looking (Tr. 167) at the picture, but if Your Honor desires, I will withdraw it.

The Court: Please.

Mr. Smith: All right, sir.

Q. (By Mr. Smith) Mr. Gwinn, would you state to the jury what you saw on the occasion, the afternoon of July 28th, when you returned to the derail at Hyatts? A. Well the jeep was turned completely over, back upon its wheels, and where the accident occurred, coming around the derail, the jeep—the tracks showed it —

Mr. Gaines: (Interposing) Objection. I don't think this man knows where the accident occurred. He may state what he saw, if Your Honor please. Limit it to that.

The Court: If you will restrict your testimony to what you saw. In other words, you saw the tracks going around the derail; keep going from there.